Supreme Court, U.S.
FILED
NOV 18
ALEXANDER L. STEVAS,
CLERK

No. 82-473

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD G. SYMANOWICZ, PETITIONER

v.

ARMY AND AIR FORCE EXCHANGE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Case:

Kei Jidosha Hanbai K.K., 73-1 B.C.A. (CCH) § 9982 (1973) 4

Treaties and statutes:

Treaty of Mutual Cooperation and Security, Jan. 19, 1960, United States-Japan, art. VI, 11 U.S.T. 1652 *et seq.*, T.I.A.S. No. 4510 ..... 1, 3

art. XVIII(5), 11 U.S.T. 1668 3

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. IV) 901 et seq. 1

Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171 *et seq.* :

5 U.S.C. 2105(c) 1

5 U.S.C. 8171-8173 1

5 U.S.C. 8171(a) 1

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Petitioner contends that the Agreement adopted pursuant to the Treaty of Mutual Cooperation and Security, Jan. 19, 1960, United States-Japan, art. VI, 11 U.S.T. 1652 *et seq.*, T.I.A.S. No. 4510, requires that he be awarded benefits under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. IV) 901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171-8173.[1]

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[1]Under 5 U.S.C. 8171(a), the LHWCA extends to "an employee of a nonappropriated fund instrumentality described by [5 U.S.C. 2105(c)] who is * * * a United States citizen * * * employed outside the continental United States." Respondent Army and Air Force Exchange Service is a nonappropriated fund instrumentality within the meaning of Section 2105(c).

1. Petitioner, an American citizen, was employed in Japan by Kei Motor Company (Pet. App. A2). In December 1970, he was injured in an automobile accident while en route from Misawa to Fuchu in Japan (*ibid.*). At the time of the accident, petitioner was transporting four snow tires at the request and for the benefit of the Army and Air Force Exchange Service. The Exchange requested petitioner to deliver the tires, since he was already planning to return to Fuchu from Misawa on that day (*id.* at A2-A3). Kei had a business relationship with the Exchange, unrelated to the delivery of tires, and the request was prompted by that relationship (*id.* at A8). Petitioner and his employer were not promised and did not receive any payment for transporting the tires (*ibid.*).

2. After the injury, petitioner filed a claim for compensation against the Exchange pursuant to the LHWCA, asserting that he was an Exchange employee at the time of the accident. An administrative law judge (Pet. App. A21-A35) and the Benefits Review Board (*id.* at A12-A20) denied the claim, concluding that petitioner was not an Exchange employee, but was a volunteer assisting the Exchange in furtherance of his own or his employer's interests.

On appeal, the court of appeals affirmed, upholding the finding that petitioner was "a gratuitous worker, a volunteer" for the Exchange (Pet. App. A8; 672 F.2d 638, 642).[2] The court of appeals did not discuss any issue relating to the Treaty between the United States and Japan.

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[2]In the court of appeals, the Director, Office of Workers' Compensation Programs, unsuccessfully argued that the administrative law judge and Benefits Review Board employed the wrong test to deny petitioner's status as an Exchange employee. This issue is not presented by petitioner here.

3. The sole question presented by petitioner (Pet. 6-9) is whether art. XVIII(5) of the Agreement under art. VI of the Treaty of Mutual Cooperation and Security, *supra*, 11 U.S.T. 1668, dictates a result different from that reached by the court of appeals.[3] Petitioner asserts (Pet. 8) that the Treaty mandates that claims such as his be determined pursuant to Japanese law, and argues (*ibid.*) that Japanese proceedings have conclusively determined that he was working for the Exchange. Neither claim has merit.

To begin with, petitioner is incorrect that art. XVIII(5) of the Agreement has anything to do with this case. First, the provision by its terms requires the United States employee or other individual for whom the United States armed forces are responsible to cause damage in Japan to a third party. In this case petitioner injured only himself. Second, the Treaty obviously was intended to cover certain claims against the United States by persons who were not members of the armed forces, rather than purely intra-military disputes. Petitioner's assertion, however, is that he was an employee of the Exchange at the time of the accident. Hence, the Treaty is wholly irrelevant to petitioner's claim.

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[3]Article XVIII(5) of the Agreement adopted pursuant to the Treaty, *supra*, 11 U.S.T. 1668, provides in pertinent part (Pet. App. A72):

> Claims * * * arising out of acts or omissions of members or employees of the United States armed forces done in the performance of official duty, or out of any other act, omission or occurrence for which the United States armed forces are legally responsible and causing damage in Japan to third parties, other than the Government of Japan, shall be dealt with by Japan in accordance with the following provisions:
>
> (a) Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of Japan with respect to claims arising from the activities of its Self-Defense Forces.

Moreover, petitioner's contention that proceedings in Japan established that he was an Exchange employee is without any support in the record.[4] The petition fails to identify any Japanese law or adjudication which would mandate, or even suggest, that his LHWCA claim should be granted. Petitioner erroneously cites a decision by the Armed Services Board of Contract Appeals as support for his assertion that "[u]nder Japanese law Petitioner was found to be a worker (i.e. employee) of the U.S. Exchange" (Pet. 4-5 & n.3) (footnotes omitted). The decision of the Board is, if anything, directly contrary to petitioner's claim here.

The Board, in reviewing a government contract dispute that included a claim by Kei Motors for compensation from the Exchange for transporting the four snow tires, ruled that Kei was entitled to no compensation because it rendered the service to the Exchange "as a matter of personal and business accommodation, * * * a voluntary favor." *Kei Jidosha Hanbai K.K.*, 73-1 B.C.A. (CCH) § 9982, at 46,856 (1973). The Board also found that petitioner must have been an employee of Kei (and not the Exchange) at the time of the accident, because Kei had collected workers' compensation on petitioner's behalf. *Id.* at 46,853, 46,858. Accordingly, the Treaty casts no doubt on the court of appeals' conclusion that petitioner was not employed by the Exchange so as to be covered by the LHWCA.

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[4]We are unaware of any record basis for petitioner's statement (Pet. 4) that "[a]dministrative proceedings in Japan, held by the Tachikawa Compensation Bureau pursuant to Japanese law, found that Petitioner could not collect workers' compensation from Japan because he was not performing work for Kei Motor Company." But even if a Japanese Bureau did so find, nothing in the Treaty relied upon by petitioner precludes the Department of Labor from making its own determination of the LHWCA coverage question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1982

DOJ-1982-11